JUL 19 2004

No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF OF *AMICI CURIAE* FORMER U.S. DIPLOMATS MORTON ABRAMOWITZ, STEPHEN W. BOSWORTH, STUART E. EIZENSTAT, JOHN C. KORNBLUM, PHYLLIS E. OAKLEY, THOMAS R. PICKERING, FELIX G. ROHATYN, J. STAPLETON ROY, AND FRANK G. WISNER IN SUPPORT OF RESPONDENT

DONALD FRANCIS DONOVAN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

STEPHEN B. BRIGHT
SOUTHERN CENTER FOR HUMAN
RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303

HAROLD HONGJU KOH
Counsel of Record
JAMES J. SILK
MARY J. HAHN
ALLARD K. LOWENSTEIN INTERNATIONAL
HUMAN RIGHTS CLINIC
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06520
(203) 432-8368

Counsel for Amici Curiae

QUESTION PRESENTED

Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE EXECUTION OF JUVENILE OFFENDERS OFFENDS MINIMUM STANDARDS OF DECENCY THAT HAVE BEEN EMBRACED BY NEARLY EVERY NATION IN THE WORLD. 7

A. International and Regional Bodies Have Condemned the Execution of Child Offenders by States in the United States. 8

B. The Nations of the World, Including Both Our Close Allies and Countries with Poor Human Rights Records, are Virtually Unanimous in Their Rejection of Executing Juvenile Offenders in Law and in Practice. 14

II. THE STRONG INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF JUVENILE OFFENDERS HAS INCREASINGLY ISOLATED THE UNITED STATES DIPLOMATICALLY. 20

III. INTERNATIONAL STANDARDS AND PRACTICES ARE RELEVANT TO DETERMINING EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 1, 6, 27

Napoleon Beazley v. United States, Case 12.412, Report No. 101/03, 29 Dec. 2003 14

Coker v. Georgia, 433 U.S. 584 (1977) 28

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 20

Michael Domingues v. United States, Case 12.285, Report No. 62/02, 22 October 2002 13

Enmund v. Florida, 458 U.S. 782 (1982) 27

Estelle v. Gamble, 429 U.S. 97 (1976) 6

Grutter v. Bollinger, 539 U.S. 306 (2003) 28

Lawrence v. Texas, 539 U.S. 558 (2003) 28

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 28

The Paquete Habana, 175 U.S. 677 (1900) 6, 7

Raines v. Byrd, 521 U.S. 811 (1997) 28

United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) 6

Sosa v. Alvarez Machain, 124 S. Ct. 2739 (2004) 7

Thompson v. Oklahoma, 487 U.S. 815 (1988) 27

Trop v. Dulles, 356 U.S. 86, 101 (1958) 26, 27

Washington v. Glucksberg, 521 U.S. 702 (1997) 28

Constitutional Provisions

U.S. Const. amend. VIII 2

U.S. Const. amend. XIV 2

Other Sources

The Abolition of Capital Punishment, Res. 1044, Eur. Parl. Ass., 25th Sitting (Oct. 4, 1994) 13

An Act to Prohibit Capital Punishment of Juvenile Offenders, SB 182, S. Dak. 2004 Sess. (Feb. 6, 24, 2004) 19

Letter from the Ambassador of Spain, Ambassador of Denmark, and the Delegation of the European Commission, to the Texas Board of Pardons and Paroles (May 7, 2002) 21

American Bar Association, *Beazley Execution: Assembly President Calls for Clemency*, Aug. 10, 2001 25

American Bar Association, *Juvenile Offender Napoleon Beazley Facing Execution in Texas* 21

American Bar Association, *Juvenile Death Penalty: Scott Hain* 16

Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/007/2002 ..... 14, 15, 23

Amnesty International, *The Death Penalty Worldwide: Developments in 2003*, ACT 50/007/2004 ..... 15, 16, 17

Amnesty International, *Execution of Child Offenders: Updated Facts and Figures*, POL 3-/007/2004 (Feb. 16, 2004) 17, 18

Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/005/2003 14

Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/008/2004 ..... 15, 16, 17

Amnesty International, *United States of America – Too Young to Vote, Old Enough to be Executed: Texas Set to Kill Another Child Offender*, July 2001 24

Annual Report of the Inter-American Commission on Human Rights 2002, Report N° 62/02, Case 12.285, Michael Domingues v. United States 22

Annual Report of the Inter-American Commission on Human Rights 2003, Report N° 97/03, Case 11.193, Gary T. Graham (now known as Shaka Sankofa) 22

Annual Report of the Inter-American Commission on Human Rights 2003, Report N° 101/03, Case 12.412, Napoleon Beazley 22

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) 27

China Hits Back on Human Rights, Reuters, Apr. 3, 2003 26

Council of Europe, Res. 1253 (June 25, 2001) 22

Council of Europe Appeals on Behalf of U.S. Inmate Sentenced as a Teen-Ager to Die, Associated Press, Aug. 15, 2001 24

A Covenant with Death, The Economist, May 12, 2001 23

Richard C. Dieter, Executive Director, Death Penalty Information Center, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (Oct. 1999) 23

Europe Outraged Over Graham Execution, CBS News, June 23, 2000 ..... 24, 25

European Union, *The EU's Human Rights & Democratisation Policy: Abolition of the Death Penalty* 13

European Union, *European Union in the U.S.: EU Memorandum on the Death Penalty* 12

European Union, *European Union in the U.S.: EU Policy and Action on the Death Penalty* 21

European Union, *European Union in the U.S.: Guidelines to EU Policy Towards Third Countries on the Death Penalty*, June 3, 1998 12

Europeans Deplore Executions in the U.S., N.Y. Times, Feb. 26, 2000 25

French Lawmaker Denounces United States' Use of Death Penalty, Associated Press Worldstream, June 10, 2000 25

Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215 (1992) 27

High Commissioner for Human Rights Expresses Concerns About Scheduled Execution of Two Juvenile Offenders in United States, UN Press Release, June 23, 2000 9

Human Rights Committee, General Comment No. 24 (52), U.N. Doc. A/50/40, Vol. I (1995), Annex V 12

Human Rights Committee, U.N. Doc A/50/40, paras. 279, 292, originally issued as U.N. Doc. CCPR/C/79/Add.50 (1995) 12

Human Rights Watch, *U.S.: The Death Penalty and Juvenile Offenders* 18

Information Office of the State Council of the People's Republic of China, Human Rights Record of the United States in 2003 (Mar. 1, 2004) 26

The International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990* 17

Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001 ..... 23, 26

Stephan M. Minikes, *Right of Reply: Intervention on the Death Penalty, delivered to the Permanent Council of The Organization for Security and Cooperation in Europe (OSCE)*, July 25, 2002 24

Norwegian Ministry of Foreign Affairs, *Norway Asks USA to Pardon American on Death Row*, Press Release, Feb. 8, 2001 24

Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, U.N. GAOR, 51st Sess., U.N. Doc. A/51/457 (1996) 10

Office of the High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* 7

The Question of the Death Penalty, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/RES/2003/67 (2003) 8

The Question of the Death Penalty, U.N. CHR, 58th Sess., para. 4, U.N. Doc. E/CN.4/RES/2002/77 (2002) 8

The Question of the Death Penalty, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/RES/2001/68 (2001) 8

The Question of the Death Penalty, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/RES/2000/65 (2000) 8

The Question of the Death Penalty, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/RES/1999/61 (1999) 8

The Question of the Death Penalty, U.N. CHR 54th Sess., U.N. Doc. E/CN.4/RES/1998/8 (1998) 8

The Question of the Death Penalty, U.N. CHR 53rd Sess., U.N. Doc. E/CN.4/RES/1997/12 (1997) 8

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 58th Sess., U.N. Doc. E/CN.4/2002/74 (2002) 9

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/2001/9 (2001) 9-10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/2000/3 (2000) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39 (1999) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 54th Sess., U.N. Doc. E/CN.4/1998/68 (1997) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 53rd Sess., U.N. Doc. E/CN.4/1997/60 (1996) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 51st Sess., U.N. Doc. E/CN.4/1995/61 (1994)..... 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 50th Sess.U.N. Doc. E/CN.4/1994/7 (1993) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 49th Sess., U.N. Doc. E/CN.4/1993/46 (1992) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America, U.N. ESCOR, 54th Sess., UN Doc. E/CN.4/1998/68/Add.3 (1998) 10

Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/2003/3/Add.1 (2003) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 58th Sess., U.N. Doc. E/CN.4/2002/74 (2002) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 57th Sess., U.N. Doc. E/CN.4/2001/9 (2001) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., U.N. Doc. E/CN.4/2000/3 (2000) 10, 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39 (1999) 10

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 55th Sess., U.N. Doc. E/CN.4/1999/39/Add.1 (1999) 11

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 52nd Sess., U.N. Doc. A/51/457 (1996)..... 11

Restatement (Third) of Foreign Relations Law of the United States § 102 (1987)..... 13

Felix G. Rohatyn, Op-Ed, *America's Deadly Image*, Washington Post, Feb. 20, 2001, at A23 23

Letter from Mary Robinson, UN High Commissioner for Human Rights, to the Press Conference organized by the Death Penalty Information Center (Oct. 12, 1999)..... 21

William Schabas, *The Abolition of the Death Penalty in International Law* (1997)..... 23

Letter from Walter Schwimmer, Secretary General, Council of Europe, to Rick Perry, Governor of Texas (July 15, 2002) 22

Press Release by Council of Europe Secretary General, Walter Schwimmer 22

Bruce Shapiro, *Dead Reckoning: A World Effort to Force an End to US Death Penalty is Gaining Strength*, The Nation, Aug. 2001 13

Situation of Human Rights in the Democratic Republic of Congo, U.N. CHR, 59th Sess., U.N. Doc. E/CN.4/RES/2003/15 (2003) 17

Status of the International Covenants on Human Rights, Question of the Death Penalty, U.N. CHR, 59th Sess., U.N. Doc., E/CN.4/2003/106 (2003) 15

Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-April 30, 2004* (May 4, 2004) 11, 19

United Nations Commission on Crime Prevention and Criminal Justice, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty: Report of the Secretary-General*, U.N. Doc. E/CN.15/2001/10 (2001) 12

United Nations Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, U.N. Doc. E/RES/1984/50 (1984) 6

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death*

Penalty, Particularly in Relation to Juvenile Offenders, 52d Sess., Res. 1999/4, U.N. Doc. E/CN.4/SUB.2/RES/1999/4 (1999) 7

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000) 7

United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Summary Record of 6th Meeting*, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2000/SR.6 (2000) 12

INTEREST OF *AMICI CURIAE*[1]

Amici curiae have served as diplomats representing the government of the United States at home and abroad in both Republican and Democratic administrations. Four *amici* (Abramowitz, Pickering, Roy, Wisner) retired with the rank of Career Ambassador, the highest rank that can be awarded to members of the United States Foreign Service. *Amici* submit this brief to advise this Court about the views and practices of nations with which *amici* are particularly well acquainted, and the likely impact that Missouri's continuing administration of the death penalty against juveniles would have upon our diplomatic relations with foreign governments and upon our standing in the international community.

Some of the signatories to this brief oppose the administration of the death penalty principally with respect to the execution of juvenile offenders; others oppose its application in all circumstances.[2] But all *amici* agree upon three basic principles: first, that the current practice of executing juveniles is inconsistent with minimum standards of decency shared by nearly all nations of the world; second, that the continuation of this practice by a few states in the United States strains diplomatic relations with close American allies, increases America's diplomatic isolation, and impairs important U.S. foreign policy interests at a critical time; and third, that these considerations (along with

---

[1] Pursuant to Sup. Ct. R. 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

[2] Each of these former diplomats filed an *amicus* brief in *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding execution of persons with mental retardation violates Eighth Amendment).

arguments presented by Respondent Simmons and other *amici* supporting Respondent) should lead this Court to conclude that the practice of executing juveniles offends our evolving standards of decency, is both cruel and unusual, and hence, violates the Eighth and Fourteenth Amendments of the United States Constitution. U.S. Const. amends. VIII, XIV.

Amici curiae include the following:[3]

Morton Abramowitz is a Senior Fellow at The Century Foundation. A Career Ambassador, he served as U.S. Ambassador to Turkey, Assistant Secretary of State for Intelligence and Research, U.S. Ambassador to the Mutual and Balanced Force Reduction Negotiations in Vienna, U.S. Ambassador to Thailand, and Deputy Assistant Secretary of Defense for Inter-American, East Asian and Pacific Affairs. He has also served as President of the Carnegie Endowment For International Peace and as Acting President of the International Crisis Group.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

---

[3] The current affiliations of *amici* are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue here.

Stuart E. Eizenstat is a partner at the Washington, D.C. law firm of Covington and Burling. During his career in public service, he served as Deputy Secretary of the Treasury, Undersecretary of State for Economic, Business and Agricultural Affairs, Undersecretary of Commerce for International Trade, U.S. Ambassador to the European Union, Special Representative of the President and the Secretary of State on Holocaust Era Issues, Chief Domestic Policy Adviser to the President and Executive Director of the White House Domestic Policy Staff.

John C. Kornblum is Chairman of Lazard & Co. GmbH in Germany. During his diplomatic career, he served as U.S. Ambassador to the Federal Republic of Germany, Assistant Secretary of State for European and Canadian Affairs, Senior Deputy Assistant Secretary of State for European and Canadian Affairs, U.S. Ambassador to the Conference of Security and Cooperation in Europe, Special Envoy to the Balkans, and U.S. Deputy Permanent Representative to the North Atlantic Treaty Organization in Brussels.

Phyllis E. Oakley is an Adjunct Professor at the Johns Hopkins School of Advanced International Studies (SAIS). During her career in public service, she served as Assistant Secretary of State for Intelligence and Research, Assistant Secretary of State for Population, Refugees, and Migration, Senior Deputy Assistant Secretary of State for Population, Refugees, and Migration, Deputy Assistant Secretary for Regional Analysis in the Intelligence Bureau, and Deputy Spokesman for the State Department.

Thomas R. Pickering is a former Under Secretary of State for Political Affairs. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador and Permanent Representative to the United Nations in New York, U.S. Ambassador to The Russian Federation, U.S. Ambassador to India, U.S. Ambassador to

Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation.

Felix G. Rohatyn is the President of Rohatyn Associates. He was previously Counselor at the Council on Foreign Relations. He is a Trustee of the Center for Strategic and International Studies. He served from 1997 to 2000 as U.S. Ambassador to France, and before that, he was Partner and Managing Director of Lazard Freres, Chairman of the Municipal Assistance Corporation, and Member of the Board of Governors of the New York Stock Exchange.

J. Stapleton Roy is Managing Director of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Frank G. Wisner is Vice-Chairman of the American International Group. A Career Ambassador, he served as U.S. Ambassador to India, U.S. Ambassador to the Philippines, U.S. Ambassador to Egypt, and U.S. Ambassador to Zambia. He also served as Under Secretary of Defense for Policy, Under Secretary of State for International Security Affairs, and Senior Deputy Assistant Secretary of State for African Affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is the leading executioner of juvenile offenders in the world. Between 1990 and 2003, states within the United States executed more juvenile offenders than *the rest of the world combined*. Of all the established democracies in the world, only the United States is known to execute individuals who were younger than eighteen when their crimes were committed.[4] Even nations that the United States consistently condemns for severe violations of human rights are virtually unanimous in their rejection of the execution of juvenile offenders. In good measure, this is because only two countries — the United States and Somalia — have not joined the rest of the world in ratifying the Convention on the Rights of the Child, which prohibits the execution of juvenile offenders.

In practice, only eight countries in the world are alleged to have executed juvenile offenders between 1990 and 2003, and over the past four years, that number has fallen to five: the Democratic Republic of Congo, China, Iran, Pakistan, and the United States. In no other area of human rights does the United States consider these nations to be our equals. Yet each of these other countries has recently abolished the death penalty for juveniles or has taken steps towards eliminating this practice. In light of the nearly universal condemnation of the execution of minors, continuation of this practice by the United States guarantees daily and growing criticism from the international community and our closest allies.

As former diplomats, *amici* make three submissions, based upon their first-hand observation and extensive

---

[4] *Amici* will refer to individuals who were under the age of eighteen at the time of their offenses as "juvenile offenders."

experience in foreign affairs.[5] First, the current U.S. practice of executing juvenile offenders is manifestly inconsistent with global standards of decency that have been embraced by nearly every nation in the world. Second, permitting Missouri to execute Respondent Simmons will strain diplomatic relations with close U.S. allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase our diplomatic isolation at a critical time, and impair important U.S. foreign policy interests. Third, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that execution of persons with mental retardation offends civilized standards of decency, in part because "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins*, 536 U.S. at 316 n.21. To sustain the similarly disapproved practice of executing juvenile offenders would not only deny the "decent respect to the opinions of mankind" required by our Founding Fathers, but would also offend widely accepted "concepts of dignity, civilized standards, humanity and decency" that lie at the core of the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Common sense demands that a punishment now so universally rejected be banned as both cruel and unusual under the Eighth Amendment.

---

[5] This Court has long held that international law standards "may be ascertained by consulting the . . . general usage and practice of nations," *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61(1820), and by examining "as evidence of these . . . the works of . . . *commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.*" *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

ARGUMENT

I. THE EXECUTION OF JUVENILE OFFENDERS OFFENDS MINIMUM STANDARDS OF DECENCY THAT HAVE BEEN EMBRACED BY NEARLY EVERY NATION IN THE WORLD.

The execution of juvenile offenders is manifestly inconsistent with minimum international standards of decency. When the rest of the member nations of the United Nations ratified the Convention on the Rights of the Child, they committed themselves to banning executions of child offenders. Only two nations — the United States and Somalia (which has long lacked an organized government) — have declined to ratify this convention.[6] It thus became inevitable that the United States would soon stand virtually alone in executing juvenile offenders.

Given the near unanimity of law and practice against executing juvenile offenders worldwide, *amici* believe that the current practice by a few states in the United States violates customary international law, which "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Sosa v. Alvarez Machain*, 124 S. Ct. 2739, 2764 (2004) (declaring that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations").

---

[6] More than a decade ago, the United States signed this convention, indicating its intent to ratify. *See* Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, *available at* http://www.unhchr.ch/pdf/report.pdf (June 9, 2004).

A. International and Regional Bodies Have Condemned the Execution of Child Offenders by States in the United States.

Numerous international and regional bodies have passed resolutions, statements, and judgments expressing strenuous opposition to capital punishment for child offenders. As far back as 1984, the United Nations Economic and Social Council (ECOSOC) passed by consensus a resolution stating that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death."[7]

Beginning in 1997, the U.N. Commission on Human Rights annually has adopted a resolution urging those states that retain capital punishment "[n]ot to impose it for crimes committed by persons below 18 years of age."[8] The U.N. High Commissioner for Human Rights, citing the "overwhelming international consensus that the death penalty should not apply to juvenile offenders," has also expressed

---

[7] United Nations Economic and Social Council, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR, para. 3, U.N.Doc. E/RES/1984/50 (1984).

[8] *See The Question of the Death Penalty*, U.N. CHR, 59th Sess., para. 4, U.N. Doc. E/CN.4/RES/2003/67 (2003); *The Question of the Death Penalty*, U.N. CHR, 58th Sess., para. 4, U.N. Doc. E/CN.4/RES/2002/77 (2002); *The Question of the Death Penalty*, U.N. CHR, 57th Sess., para. 4, U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, U.N. CHR, 56th Sess., para. 3, U.N. Doc. E/CN.4/RES/2000/65 (2000); *Question of the Death Penalty*, U.N. CHR, 55th Sess., para. 3, U.N. Doc. E/CN.4/RES/1999/61 (1999); *Question of the Death Penalty*, U.N. CHR 54th Sess., para. 3, U.N. Doc. E/CN.4/RES/1998/8 (1998); *Question of the Death Penalty*, U.N. CHR 53rd Sess., para. 2, U.N. Doc. E/CN.4/RES/1997/12 (1997).

serious concern about executions of juvenile offenders in the United States.[9]

The U.N. Sub-Commission on the Promotion and Protection of Human Rights has similarly condemned the execution of juvenile offenders and has called upon all states to eliminate this practice.[10] The Sub-Commission has declared that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law."[11]

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has also repeatedly criticized the United States for the practice of executing juvenile offenders,[12] and has called for the elimination of this

---

[9] *High Commissioner for Human Rights Expresses Concerns About Scheduled Execution of Two Juvenile Offenders in United States*, U.N. Press Release, June 23, 2000, *at* http://www.unhchr.ch/huricane/huricane.nsf/0/58DC70E87 E8C9997C1256907004AB060?opendocument (last consulted July 15, 2004).

[10] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 52d Sess., Res. 1999/4, para. 1, U.N. Doc. E/CN.4/Sub.2/RES/1999/4 (1999).

[11] United Nations Sub-Commission on the Promotion and Protection of Human Rights, *The Death Penalty, Particularly in Relation to Juvenile Offenders*, 53d Sess., Res. 2000/17, U.N. Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

[12] *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 60th Sess., para. 96, U.N. Doc. E/CN.4/2004/7 (2004); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 58th Sess., paras. 83, 102, 104, 149, U.N. Doc. E/CN.4/2002/74 (2002); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 57th Sess., paras. 65, 78, 119, U.N. Doc. E/CN.4/2001/9 (2001); *Report of the Special Rapporteur on*

practice.[13] Between 1992 and 2003, the Special Rapporteur sent twenty urgent appeals on behalf of fifteen individuals scheduled to be executed for crimes committed before the age of 18, including Respondent Simmons.[14] Despite these urgent appeals, ten of these juvenile offenders have been executed by individual states.[15]

The United Nations Human Rights Committee (HRC), the U.N. body charged with monitoring states' compliance with the International Covenant on Civil and Political Rights (ICCPR), has also "deplored" the U.S. practice of executing child offenders as contrary to customary international law. Article 6(5) of the ICCPR expressly prohibits the execution of juvenile offenders, but the United States entered a reservation to that provision, asserting that it retains the prerogative to impose the death sentence on juvenile offenders. The HRC has declared that "provisions in the [ICCPR] that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. *Accordingly, a State*

Extrajudicial, Summary or Arbitrary Executions, U.N. CHR, 56th Sess., paras. 68, 97, U.N. Doc. E/CN.4/2000/3 (2000); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 55th Sess., paras. 36, 82, U.N. Doc. E/CN.4/1999/39 (1999); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 54th Sess., paras. 91, 92, U.N. Doc. E/CN.4/1998/68 (1997); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 53rd Sess., paras. 90, 116, U.N. Doc. E/CN.4/1997/60 (1996); *Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions*, U.N. GAOR, 51st Sess., paras. 50, 85, 115, 143, U.N. Doc. A/51/457 (1996); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 51st Sess., paras. 325, 327, 373, 380, U.N. Doc. E/CN.4/1995/61 (1994); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, paras. 620, 624, 630, 685, 687, U.N. Doc. E/CN.4/1994/7 (1993); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 49th Sess., paras. 50, 52, 625, 679, U.N. Doc. E/CN.4/1993/46 (1992).

[13] *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America*, U.N. ESCOR, 54th Sess., paras. 49, 145, 156(b), U.N. Doc. E/CN.4/1998/68/Add.3 (1998).

[14] *See Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Execution*, U.N. CHR, 59th Sess., paras. 511, 513, 514, 519, 521, 522, U.N. Doc. E/CN.4/2003/3/Add.1 (2003) (Napoleon Beazley, T.J. Jones, Steven Pannebaker, Toronto Patterson, Christopher Simmons, Alexander Edmund Williams); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 58th Sess., paras. 83, 102-104, U.N. Doc. E/CN.4/2002/74 (2002) (Napoleon Beazley, Gerald Lee Mitchell, Antonio Richardson); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 57th Sess., para. 79, U.N. Doc. E/CN.4/2001/9 (2001) (Shaka Sankofa (Gary Graham), Alexander Edmund Williams); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 56th Sess., para. 68, U.N. Doc. E/CN.4/2000/3 (2000) (Sean Sellers); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 55th Sess., para. 255, U.N. Doc. E/CN.4/1999/39/Add.1 (1999) (Napoleon Beazley, Joseph John Cannon); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 52nd Sess., para. 85, U.N. Doc. A/51/457 (1996) (Johnny Frank Garrett); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 51st Sess., para. 327, U.N. Doc. E/CN.4/1995/61 (1994) (Christopher Burger); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 50th Sess., para. 620, U.N. Doc. E/CN.4/1994/7 (1993) (Ruben Cantu, Gary Graham (Shaka Sankofa), Frederick Lashley); *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. CHR, 49th Sess., para. 635, U.N. Doc. E/CN.4/1993/46 (1992) (Johnny Frank Garrett).

[15] *See* Victor Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973-April 30, 2004*, at 4 (May 4, 2004), *at* http://www.law.onu.edu/faculty/streib/JuvDeathApr302004.pdf (last visited July 16, 2004).

may not reserve the right . . . to execute . . . children."[16] In direct response to the United States' initial report on domestic compliance with the ICCPR, the HRC again found the U.S. reservation to Article 6(5) incompatible with the object and purpose of the Covenant and officially recommended that the United States withdraw its reservation.[17]

Regional bodies have likewise condemned the execution of juvenile offenders. The Council of Europe and the European Union, whose members include our closest allies, have expressed vehement opposition to the death penalty, particularly as applied to juveniles. The European Union has explained that "[a]ll the EU Member States reject the idea of incorrigibility of juveniles"[18] and has described the prohibition of the execution of juvenile offenders as a "minimum standard[]" with which its members must comply.[19] As a result, Central and Eastern European

---

[16] Human Rights Committee, General Comment No. 24 (52), U.N. Doc. A/50/40, Vol. I (1995), Annex V, 119-125 (emphasis added).

[17] Human Rights Committee, U.N. Doc A/50/40, paras. 279, 292, originally issued as U.N. Doc. CCPR/C/79/Add.50 (1995).

[18] European Union , *European Union in the U.S.: EU Memorandum on the Death Penalty*, *at* http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm (last consulted June 14, 2004); *see also id.* (stating that "[t]he EU is equally concerned about the imposition of the death penalty on persons below 18 years of age").

[19] *See, e.g., Id.*; European Union, *European Union in the U.S.: Guidelines to EU Policy Towards Third Countries on the Death Penalty*, June 3, 1998 (detailing situations in which the EU will issue demarches, such as when it "becomes aware of individual death penalty cases which violate minimum standards. . . . Where states insist on maintaining the death penalty, the EU considers it important that the following minimum standards should be met. . . . Capital punishment may not be imposed on . . . [p]ersons below 18 years of age at the time of the commission of

countries that aspire to enter the European system must abolish the death penalty for juvenile offenders as a precondition for membership in the European political and economic community.[20]

The Inter-American Commission on Human Rights, one of the principal bodies of the Organization of American States (OAS), has also repeatedly criticized the United States for its practice of executing juvenile offenders, finding that such executions violate core fundamental human rights. In 2002, the Inter-American Commission declared that "a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime" and that "this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of jus cogens." *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, paras. 84-85, 22 Oct. 2002.[21]

---

their crime"), *at* http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm (last consulted June 14, 2004); *see also* Bruce Shapiro, *Dead Reckoning*, The Nation (July 26, 2001) (quoting Walter Schwimmer, Secretary General of the Council of Europe, who declared that the American death penalty is "'our greatest concern'") *available at* http://www.thenation.com/doc.mhtml%3Fi=20010806&s =Shapiro.

[20] *See* European Union, *The EU's Human Rights & Democratisation Policy: Abolition of the Death Penalty*, *at* http://europa.eu.int/comm/external_relations/human_rights/adp/ (last consulted July 15, 2004); *The Abolition of Capital Punishment*, Res. 1044, Eur. Parl. Ass., 25th Sitting (Oct. 4, 1994), *available at* http://assembly.coe.int/Documents/AdoptedText/TA94/ERES1044.htm.

[21] A *jus cogens* norm is a norm "recognized by the international community of states as peremptory, permitting no derogation." Restatement (Third) of Foreign Relations Law of the United States § 102, cmt. k (1987); *see also id.* at note 6 (indicating adoption of definition of *jus cogens* from Article 53 of the Vienna Convention on the Law of Treaties).

The Commission concluded that "the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community." *Id.*, para. 84. The Commission urged the United States to commute Domingues' sentence and "to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age." *Id.*, para. 113.2. The Commission reiterated its position on the peremptory nature of the prohibition against the execution of juvenile offenders in the case of Napoleon Beazley, a juvenile offender executed by the state of Texas in 2003. *See Napoleon Beazley v. United States*, Case 12.412, Report No. 101/03, paras. 47-50, 29 Dec. 2003.

B. The Nations of the World, Including Both Our Close Allies and Countries with Poor Human Rights Records, are Virtually Unanimous in Their Rejection of Executing Juvenile Offenders in Law and in Practice.

The consistent and growing practice of other nations underscores the cruel and unusual nature of executing juvenile offenders. The execution of juvenile offenders accounts for only a tiny fraction of known executions worldwide, making it a truly unusual punishment.[22] As of

---

[22] In 2000, executions of juvenile offenders constituted less than one-half of one percent (6 out of 1457) of executions recorded worldwide. Amnesty International, *Children and the Death Penalty: Executions Worldwide Since 1990*, ACT 50/007/2002, *at* http://web.amnesty.org/library/Index/ENGACT500072002?open&of=ENG-392 (Sept. 2002) [hereinafter *Children and the Death Penalty*]. Four of these six executions took place in the United States. *Id.* In 2002, executions of juvenile offenders dropped to less than two-tenths of one percent (3 of 1526) of executions in the world; all three took place in the United States. Amnesty International, *Facts and Figures on the Death Penalty*, ACT 50/005/2003, *at* http://web.amnesty.org/library/ Index/

2003, more than half of all nations in the world had abolished the death penalty, in law or in practice.[23] One nongovernmental organization reports that of the 118 nations whose laws still provide for the death penalty for at least some offenses, 113 either have provisions in their laws that expressly prohibit the execution of child offenders or may be presumed to exclude such executions by being party to an international convention prohibiting the death penalty, without having entered a reservation to the relevant articles of these treaties.[24] Thus, nations throughout the world, regardless of their political ideologies, social mores, or religious traditions, have bound themselves to reject the practice of executing juvenile offenders.

Since this Court last gave plenary consideration to the constitutionality of the juvenile death penalty, the number of nations that allow for the imposition of the death penalty against juvenile offenders has significantly decreased. Over the last decade, at least thirty-five countries from all parts of

---

ENGACT500052003? open&of=ENG-392 (Apr. 11 2003) [hereinafter *Facts and Figures 2003*].

[23] *See Status of the International Covenants on Human Rights, Question of the Death Penalty*, U.N. CHR, 59th Sess., para. 31, U.N. Doc., E/CN.4/2003/106 (2003); Amnesty International, *The Death Penalty Worldwide: Developments in 2003*, ACT 50/007/2004, *at* http://web.amnesty.org/library/Index/ ENGACT500072004?open&of=ENG-392 (Apr. 6, 2004) [hereinafter *Death Penalty Worldwide*].

[24] *Children and the Death Penalty*, *supra* note 22; *see also Facts and Figures on the Death Penalty*, ACT 50/008/2004, *at* http://web.amnesty.org/library/Index/ ENGACT500082004?open&of=ENG-392 (Apr. 6, 2004) [hereinafter *Facts and Figures 2004*]. Relevant conventions include the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the American Convention on Human Rights.

the world have either abolished the death penalty for all offenders or specifically for juvenile offenders.[25] Only a small handful of countries, each of which has been consistently criticized by the United States for severe human rights abuses, actually executes juvenile offenders, and the number of such countries has fallen over the last thirteen years. Since 1990, only eight nations are reported to have put juvenile offenders to death: China, the Democratic Republic of Congo (DRC), Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.[26] Between 2000 and 2002, only four of these countries executed minors. And in 2003, only two countries — China and the United States — were known to have executed juvenile offenders.[27]

Significantly, even those few nations that have recently executed juveniles are now repudiating the practice. China, Pakistan, and Yemen have each enacted laws to raise the minimum age for eligibility for the death penalty to eighteen,[28] and Iran is currently in the process of doing so.[29] The Democratic Republic of Congo, after urgent appeals by the international community, recently commuted the death sentences imposed upon four juvenile offenders[30] and has since abolished the military courts that ordered its only execution of a child offender since 1990.[31]

---

[25] These include countries from Africa (Angola, Côte d'Ivoire, Mauritius, Mozambique, South Africa), the Americas (Canada, Paraguay), Asia and the Pacific (Hong Kong, Nepal, Samoa, Timor-Leste) and Europe (Armenia, Azerbaijan, Bosnia-Herzegovina, Bulgaria, Cyprus, Estonia, Georgia, Lithuania, Poland, Serbia and Montenegro, Turkmenistan, and Ukraine). *Facts and Figures 2004, supra* note 24; *see also* U.N. Commission on Crime Prevention and Criminal Justice, *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty: Report of the Secretary-General*, U.N. Doc. E/CN.15/2001/10, para. 99 (2001) (noting abolition of death penalty for juveniles in Barbados and Zimbabwe). China, Pakistan and Yemen have also recently revised their criminal laws to eliminate the practice of imposing death sentences on juvenile offenders. *Death Penalty Worldwide*, *supra* note 23.

[26] The number of reported executions in each of these countries from 1990 to the present is as follows: China (1), Democratic Republic of Congo (1), Iran (8), Nigeria (1), Pakistan (3), Saudi Arabia (1), Yemen (1), and the United States (19). *Death Penalty Worldwide*, *supra note 23*. Child offenders are also currently known to be under sentence of death in two other nations: the Philippines and Sudan. *Id.* Both Nigeria and Saudi Arabia have emphatically denied that the executions reported to have taken place in those countries in 1997 and 1992, respectively, were of juvenile offenders. *See* United Nations Sub-Commission on the Promotion and Protection of Human Rights, *Summary Record of 6th Meeting*, 52nd Sess., U.N. Doc. E/CN.4/Sub.2/2000/SR.6 para. 39 (2000) (documenting Nigeria's denial that it executes juveniles); American Bar Association, *Juvenile Death Penalty: Scott Hain* (documenting Saudi-Arabia's denial of a 1992 execution of a juvenile), *at* http://www.abanet.org/crimjust/juvjus/hain.html.

[27] *Death Penalty Worldwide*, *supra* note 23.

[28] *Facts and Figures 2004*, *supra* note 24.

[29] In December 2003, the Iranian parliament approved a bill that would raise the legal minimum age for death eligibility to eighteen. This bill currently awaits approval by the Guardian Council, Iran's highest legislative body. Amnesty International, *Execution of Child Offenders: Updated Facts and Figures*, POL 3-/007/2004 (Feb. 16, 2004), *at* http://web.amnesty.org/library/index/ engpol300072004 [hereinafter *Execution of Child Offenders*].

[30] *See* The International Justice Project, *Reported Worldwide Executions of Juveniles Since 1990*, *at* http://www.internationaljusticeproject.org/juvWorld.cfm?print=yes (last visited June 14, 2004).

[31] *Situation of Human Rights in the Democratic Republic of* Congo, U.N. CHR, 59th Sess., para. 5, U.N. Doc. E/CN.4/RES/2003/15 (2003) (discussing Congo's decisions to abolish the Military Court and to commute the death sentences imposed on juvenile offenders by the Military Court), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.15.En?Opendocument; *see also Executions of Child Offenders*, *supra* note 29.

If these trends continue, the United States will soon stand alone as the only country in the world that endorses the regular execution of juvenile offenders as part of its ordinary criminal justice system.[32] By law and practice, members of the international community have pronounced with near unanimity their condemnation of the execution of juvenile offenders. Countries with far worse human rights records than the United States have recognized the cruel and unusual nature of executing juvenile offenders.

Even among the small group of nations that are reported to have executed juvenile offenders over the past fourteen years, the United States stands out, putting to death more juvenile offenders between 1990 and 2003 than all other nations in the world combined. Between 1990 and 2003, China, Nigeria, and the Democratic Republic of Congo are each reported to have executed only a single juvenile offender, in contrast to the United States' execution of *nineteen* juvenile offenders during the same period.[33] Between 2000 and 2003, the United States accounted for nearly two-thirds (nine out of fifteen) of the juvenile offenders executed in the world.[34]

Significantly, the unchanging practice of a very few states drives the global perception that the United States widely endorses this aberrant practice. Yet only a few states actually put juveniles to death, and the number of states that allow for this practice is falling. Before this Court's 1972

---

[32] Human Rights Watch, *U.S.: The Death Penalty and Juvenile Offenders*, *at* http://www.hrw.org/campaigns/deathpenalty/ docs/ update1023.htm (last visited June 14, 2004).

[33] *Execution of Child Offenders*, *supra* note 29.

[34] *Id.*

decision in *Furman v. Georgia*, 408 U.S. 238 (1972), 38 states and the federal government had executed juvenile offenders.[35] Today, that number has been halved to only 19 states,[36] and neither the federal government nor the District of Columbia authorizes death as a punishment for anyone under 18. In practice, the imposition of the death penalty upon children has become even more limited. Only three states — Texas, Virginia, and Oklahoma — account for 81 percent of the 22 executions of children in the United States since 1972.[37] No other state has executed a child in the last decade. There is no comparable area of our foreign policy — whether state taxation, immigration control, or trade

---

[35] *See* Streib, *supra* note 15, at 4 (May 4, 2004), *at* http://www.law.onu.edu/faculty/streib/JuvDeathApr302004.pdf (last visited June 14, 2004).

[36] *Id.* at 7 (reporting status of state laws as of June 30, 2003). South Dakota and Wyoming abolished the juvenile death penalty in March 2004. International condemnation of the execution of juvenile offenders has played a significant role in moving some state legislatures to abolish the juvenile death penalty. For example, in South Dakota, the primary sponsor of the bill (SB 182) to eliminate this practice declared that "internationally, the execution of juveniles is largely considered inhumane, anachronistic, and in direct conflict with the fundamental principles of justice. . . ." An Act to Prohibit Capital Punishment of Juvenile Offenders, SB 182, S. Dak. 2004 Sess., (Feb. 6, 2004) (statement of Sen. Patricia de Hueck); *audio available at* http://legis.state.sd.us/ sessions/2004/index.cfm?FuseAction=DisplayBills; *see also id.* (Feb. 24, 2004) (statement of Rep. Ben Nesselhuf) ("I propose that we pass [the bill abolishing the juvenile death penalty] today and let the world know that South Dakota cares more about human rights than the Democratic Republic of Congo. . . . and let the world know that South Dakota is as progressive as Iran . . . . [W]e are recognizing what the rest of the world already knows.")

[37] Streib, *supra* note 15, at 5. The only other states which have carried out such an execution since 1972 are Georgia, Missouri, Louisiana, and South Carolina; each has carried out one execution. *Id.* at 4.

regulation — in which we permit the practices of so few states to render our entire nation such a global pariah.

II. THE STRONG INTERNATIONAL CONSENSUS AGAINST THE EXECUTION OF JUVENILE OFFENDERS HAS INCREASINGLY ISOLATED THE UNITED STATES DIPLOMATICALLY.

By continuing to embrace the globally condemned practice of executing juvenile offenders, a few individual states risk undermining critical foreign policy interests of the entire nation. In *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385 (2000), this Court found that "statements of foreign powers necessarily involved in the President's [foreign policy] efforts, . . . indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration" of national foreign policy interests by the laws of individual states. Based on their extensive personal experience, *amici* submit that the sustained opposition to the execution of juvenile offenders in the United States constitutes relevant evidence that maintaining Missouri's law and practice of executing juvenile offenders would frustrate our broader national foreign policy goals.

Amici believe that allowing Missouri to execute Christopher Simmons will diplomatically isolate the United States and hinder its foreign policy goals by alienating countries that have been American allies of long standing. These allies, with strong rule-of-law traditions and political histories, social values, and legal systems similar to ours, have led a worldwide protest against the practice of executing juvenile offenders in the United States. At this critical time in our foreign policy, when our closest allies are needed the most, the insistence of a few states on continuing to execute juvenile offenders should not be permitted to isolate the entire nation.

Numerous international and regional organizations have consistently opposed the execution of juvenile offenders in the United States through repeated diplomatic demarches, letters, and press releases.[38] The European Union has expressed its disapproval of the execution of juvenile offenders in the United States through demarches addressing numerous juvenile executions, including the pending execution of Respondent Simmons.[39] The Secretary General

---

[38] *See, e.g.*, American Bar Association, *Juvenile Offender Napoleon Beazley Facing Execution in Texas* (reporting that "the United Nations High Commission[er] for Human Rights, the European Union, the Council of Europe and the Vatican have expressed their strongest opposition to the execution of juvenile offenders."), *at* http://www.abanet.org/crimjust/juvjus/beazley.html (last consulted June 14, 2004); *see also* Letter from Mary Robinson, UN High Commissioner for Human Rights, to the Press Conference organized by the Death Penalty Information Center (Oct. 12, 1999), *at* http://www.deathpenaltyinfo.org/article.php?scid=18&did=226#robinson; Letter from the Ambassador of Spain, Ambassador of Denmark, and the Delegation of the European Commission, to the Texas Board of Pardons and Paroles (May 7, 2002), *at* http://www.eurunion.org/legislat/DeathPenalty/BeazleyBdPardPar0507.htm; Council of Europe, Res. 1253 (June 25, 2001), *available at* http://assembly.coe.int/Documents/AdoptedText/ta01/ERES1253.htm.

[39] Demarches were transmitted in each of the following juvenile death penalty cases: Sean Sellers, Oklahoma, Feb. 11, 1999; Douglas Thomas, Virginia, June 21, 1999; Steve Roach, Virginia, Jan. 14, 2000; Glen McGinnis, Texas, Jan. 18, 2000; Gary Graham, Texas, May 17, 2000 & June 22, 2000; Antonio Richardson, Missouri, Feb. 21, 2001; Gerald Mitchell, Texas, Oct. 3, 2001; Napoleon Beazley, Texas, July 20, 2001, Aug. 10, 2001, Aug. 14, 2001 & May 7, 2002; Alexander Williams, Georgia, Feb. 14, 2002; Christopher Simmons, Missouri, Apr. 17, 2002; T.J. Jones, Texas, July 23, 2002; Toronto Patterson, Texas, July 29, 2002; Kevin Stanford, Kentucky, Oct. 7, 2002; Ronald Chris Foster, Mississippi, Dec. 16, 2002; Scott Hain, Oklahoma, Feb. 26, 2003. *See* European Union, *European Union in the U.S.: EU Policy and Action on the Death Penalty* (documenting demarches regarding juvenile offenders facing death penalty), *at* http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm#ActionUSDeathRowCases.

of the Council of Europe has expressed his "deepest concern and abhorrence" about pending executions of juvenile offenders, and has called the execution of juvenile offenders "particularly distressing."[40] The Inter-American Commission on Human Rights has likewise condemned the United States three times for executing juvenile offenders.[41] Many of the foreign governments to which *amici* have been accredited as ambassadors have expressed sustained outrage at the continued use of the death penalty, especially as applied to juveniles.[42] U.S. embassies throughout the world have been

---

[40] Letter from Walter Schwimmer, Secretary General, Council of Europe, to Rick Perry, Governor of Texas (July 15, 2002) ("I write to you to express my deepest concern and abhorrence about the imminent execution of T.J. Jones [a juvenile offender] . . . . The Council of Europe and its 44 member States are unequivocally opposed to the death penalty, considering that it has no place in a civilised democracy . . . . The case of T.J. Jones is particularly distressing, since it is reported that he was a minor at the time of the crime."), *at* http://www.abanet.org/crimjust/juvjus/tjcofe.html (last consulted June 14, 2004); Press Release by Council of Europe Secretary General, Walter Schwimmer (calling pending execution of juvenile offender Napoleon Beazley "particularly distressing"), *at* http://press.coe.int/cp/2001/555a(2001).htm.

[41] *See Annual Report of the Inter-American Commission on Human Rights 2003*, Report N° 101/03, Case 12.412, Napoleon Beazley, *available at* http://www.cidh.org/annualrep/2003eng/USA.12412.htm; *Annual Report of the Inter-American Commission on Human Rights 2003*, Report N° 97/03, Case 11.193, Gary T. Graham (now known as Shaka Sankofa), *available at* http://www.cidh.org/annualrep/2003eng/USA.11193.htm; *Annual Report of the Inter-American Commission on Human Rights 2002*, Report N° 62/02, Case 12.285, Michael Domingues, *available at* http://www.cidh.org/annualrep/2002eng/USA.12285.htm.

[42] When the United States ratified the International Convention on Civil and Political Rights in 1992 with a reservation asserting the prerogative to impose the death penalty against child offenders, eleven state parties to the convention formally objected to the U.S. reservation: Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Sweden. *See* William Schabas, *The Abolition of the Death Penalty in International Law* 314-19 (1997); *Children and the Death Penalty*, *supra* note 22.

flooded with letters and petitions signed by millions of individuals, and diplomatic missions have been significantly disrupted by demonstrations against pending executions in the United States.[43]

Amici believe that persisting in this aberrant practice of executing juveniles will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives. The United States is needlessly placed on the defensive in diplomatic missions. Instead of focusing on advancing U.S. interests, U.S. diplomats abroad are increasingly called into meetings to answer foreign criticisms of the death penalty.[44] *Amici* can personally

---

[43] *See, e.g.*, Richard C. Dieter, Executive Director, Death Penalty Information Center, *International Perspectives on the Death Penalty: A Costly Isolation for the U.S.* (Oct. 1999) ("While Paula Cooper was on death row in Indiana for a murder committed at age 15, over a million signatures were gathered in Italy protesting the sentence, and the Pope also sought to intervene."), *at* http://www.deathpenaltyinfo.org/article.php?scid=45&did=536 (last consulted June 14, 2004); Felix G. Rohatyn, Op-Ed, *America's Deadly Image*, Wash. Post, Feb. 20, 2001, at A23 (stating that "[r]epeated protests in front of the embassy in Paris, protests at our consulates, and, just recently, a petition signed by 500,000 French men and women . . . were part of a constant refrain . . . . [T]he United States is seen as executing people who have not had appropriate legal assistance, people who may be innocent . . . as well as minors."); Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001, at 2 (reporting that "[h]uman-rights organizations and thousands of demonstrators bear down on U.S. embassies with each controversial execution in America.").

[44] *See A Covenant with Death*, Economist, May 12, 2001, at 34 ("Colin Powell, the secretary of state, is routinely confronted about his country's use of the death penalty when he meets his counterparts around the world."); *see also* U.S. Ambassador Stephan M. Minikes, *Right of Reply: Intervention on the Death Penalty, delivered to the Permanent Council of The Organization for Security and Cooperation in Europe (OSCE)*, July 25, 2002 (responding to formal interventions by EU and other delegations

attest to the degree to which important bilateral meetings with our closest allies are now consumed with responding to repeated official challenges to this practice. International organizations have gone so far as to threaten the United States with economic sanctions or loss of standing due to this aberrant practice of executing juvenile offenders.[45]

---

to the OSCE regarding death sentences imposed on juvenile offenders Toronto Patterson and T.J. Jones), *at* http://www.usosce.rpo.at/archive/2002/07/25cappun.htm; Norwegian Ministry of Foreign Affairs, *Norway Asks USA to Pardon American on Death Row*, Press Release, Feb. 8, 2001 ("The American Embassy in Oslo was asked to meet early today at the Ministry of Foreign Affairs . . . . At the meeting it was emphasized that Norway supports the request by all the EU countries to the Governor of Texas and the Texas Board of Pardons and Paroles to commute the death sentence of [a juvenile offender]. At the same time Norway expressed its concern at the use of the death penalty in the USA. Applying the death penalty to persons who were minors at the time of the crime is particularly serious."), *at* http://odin.dep.no/odinarkiv/norsk/dep/ud/p10002480/eng/032001-070214/dok-bn.html (last consulted June 14, 2004); *Europe Outraged Over Graham Execution*, CBS News, June 23, 2000 (documenting opposition in Europe to execution of juvenile offender and quoting German lawmaker calling upon the German government to "'make this detestable topic the object of discussions with our American friends'"), *available at* http://www.cbsnews.com/stories/2000/06/21/ national/main207908.shtml (last consulted June 14, 2004).

[45] *See Council of Europe Appeals on Behalf of U.S. Inmate Sentenced as a Teen-Ager to Die*, Associated Press, Aug. 15, 2001 ("The Council of Europe is the guardian of the 1952 European Convention on Human Rights. In June, it threatened the United States . . . with the loss of [its] observer status unless [it] stopped practicing capital punishment. . . ."); Amnesty International, *United States of America – Too Young to Vote, Old Enough to be Executed: Texas Set to Kill Another Child Offender*, July 2001 (quoting the Chairman of the European Parliament Delegation for Relations with the United States: "[W]e are concerned that the almost universal repugnance felt in Europe and elsewhere for the continued application of the death penalty in certain American states may also have economic consequences. Europe is the foremost foreign investor in Texas. Many companies, under pressure from shareholders and public opinion to apply ethical business practices, are beginning to consider the possibility of restricting investment in the U.S. to states that do not apply

The persistence of this practice by only a few states has allowed allies and adversaries alike to challenge the United States' claim to moral authority in the domain of international human rights.[46] Such challenges deflect

---

the death penalty."), *available at* http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR511052001ENGLISH/$File/AMR5110501.pdf (last consulted June 14, 2004).

[46] *See, e.g.*, *Europeans Deplore Executions in the U.S.*, N.Y. Times, Feb. 26, 2000, at A8 (quoting Henry LeClerc, the president of the Human Rights League in Paris: "'For us, what the Americans are doing is completely incomprehensible, that such an advanced country can be involved in such an act of barbarism . . . . No European country does this. No advanced country does this. America is doing it along with countries like China and Russia and other countries that have terrible human rights records.'"); *Europe Outraged Over Graham Execution*, CBS News, June 23, 2000 (quoting German lawmaker Sabine Leutheusser-Schnarrenberger: "'It does not fit: The United States presents itself on the one hand as the world police defending human rights, and on the other side it carries out the death penalty.'"), *available at* http://www.cbsnews.com/stories/2000/06/21/national/main207908.shtml (last consulted June 14, 2004); *French Lawmaker Denounces United States' Use of Death Penalty*, Associated Press Worldstream, June 10, 2000 (quoting Raymond Forni, president of France's National Assembly: "'The United States of America's prestigious image bears a tarnish . . . . It is no longer slavery, it is no longer racial segregation, it is the death penalty . . . . We must become America's guilty conscience and ensure that it finally ceases to be the black sheep of the western democracies.'"); American Bar Association, *Beazley Execution: Assembly President Calls for Clemency*, Aug. 10, 2001 (quoting Lord Russell-Johnston, President of the Parliamentary Assembly of the 43-nation Council of Europe: "'The execution of Napoleon Beazley is set for 15 August . . . . Over eighty others, who were aged only sixteen or seventeen at the time of their crime, are on death row. This is unjustifiable, inexcusable and barbaric. A country which is . . . killing people – including juveniles . . . cannot claim world leadership in justice and human rights. The United States' moral influence in international affairs is being eroded . . . .'"), *at* http://www.abanet.org/crimjust/juvjus/ beazleycouncil.html (last consulted June 14, 2004); Marcus Mabry, *A Bad Case of Euro Envy: The Rift Between U.S. and Old World Values is Threatening America's Claim to Global Leadership*, Newsweek, Apr. 16, 2001, at 2: "[Karsten] Voigt [coordinator for German-American relations at the Foreign Ministry in

attention away from serious human rights violations in other countries that have exhibited far worse human rights records. China, for example, has repeatedly responded to U.S. reports criticizing its severe human rights abuses by taking aim at our practice of permitting the execution of juvenile offenders.[47] *Amici* believe that this continuing state practice seriously disserves this nation's broader foreign policy objectives and undermines this nation's leadership role in the world.

III. INTERNATIONAL STANDARDS AND PRACTICES ARE RELEVANT TO DETERMINING EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The almost universal abandonment of capital punishment for juvenile offenders by other nations is relevant in determining whether the practice is accepted under the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). While this Court has primarily discerned these standards by reference to the actions of state legislatures and juries, it has looked to international practices as well. Indeed, our earliest understandings of the Eighth Amendment reflected the

---

Berlin] predicts that in coming years, disagreements over values will become intractable . . . . Increasingly, Europe will find it difficult (and unpopular) to be allied with a nation whose values it doesn't share – not to mention to be led by it.").

[47] *See, e.g.*, Information Office of the State Council of the People's Republic of China, *Human Rights Record of the United States in 2003* (Mar. 1, 2004) (responding to U.S. report on abuses in China by pointing to, among other things, execution of juvenile offenders in the United States), *available at* http://news.xinhuanet.com/english/2004-03/01/content_1338758.htm; *see also China Hits Back on Human Rights*, Reuters, Apr. 3, 2003 (citing U.S. practice of executing juveniles), *at* http://www.cnn.com/2003/WORLD/asiapcf/east/04/03/ china.rights.reut/.

opinions and practices of other civilized nations. The phrase "cruel and unusual" originated in the English Bill of Rights of 1689, and the Declaration of Independence gave "decent respect to the opinions of mankind." Declaration of Independence, para. 1 (U.S. 1776); *see also* Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. Marshall L. Rev. 215 (1992). As Justice Blackmun noted, "[t]he drafters of the [Eighth] Amendment were concerned, at root, with the 'dignity of man,' and understood that 'evolving standards of decency' should be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L. J. 39, 45-46 (1994).

In keeping with this original intent, this Court has looked to international and foreign practices on a number of occasions for guidance in interpreting the Eighth Amendment's prohibition against cruel and unusual punishments. Most recently, the Court, holding that execution of the mentally retarded violates the Eighth Amendment, observed that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2003); *see also Thompson v. Oklahoma*, 487 U.S. 815, 830-31, n.31 (1988) (plurality opinion) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."). Other decisions regarding the Eighth Amendment have been informed by the practices of other nations. *See Trop*, 356 U.S. at 102-103 (relying on "virtual unanimity" of "civilized nations of the world" in finding the punishment of statelessness to be prohibited under the Eight Amendment); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (finding "international opinion concerning the acceptability of a particular punishment" relevant and, in rejecting imposition of death penalty for accomplice liability in felony murders, observing that "the doctrine of felony murder has been

abolished in England and India, severely restricted in Canada and a number of Commonwealth countries, and is unknown in continental Europe"); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding international practices regarding the death penalty for rape relevant to the "evolving standards" analysis).

International opinion has informed this Court's recent understandings of other constitutional doctrines as well. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (considering, in construing the constitutional concepts of privacy and due process, whether practices have "been accepted as an integral part of human freedom in many other countries" and have "been rejected elsewhere"); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (referencing the "international understanding" relating to affirmative action plans and citing United Nations conventions); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (arguing that an alternative system for establishing standing to sue would not be irrational, because it is followed by some European courts); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381-82 (1995) (Scalia, J., dissenting) (arguing that the experiences of Australia, Canada, and England are relevant in setting rules for the distribution of anonymous campaign literature); *Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8 (1997) (noting that "almost every western democracy" criminalized physician-assisted suicide and discussing laws in a number of nations in Western Europe).

Amici respectfully submit that abundant evidence supports the conclusion that members of the international community — ranging from liberal democracies to autocratic regimes — have reached nearly universal agreement that the continuing American practice of executing juveniles does not exhibit "decent respect to the opinions of mankind." To restore the United States to its leading position on human

rights, *amici* urge this Court to bring this country's practices with regard to execution of juvenile offenders into line with those of the rest of the world.

CONCLUSION

For the aforementioned reasons, *amici* respectfully request this Court to affirm the decision of the Missouri Supreme Court.

Respectfully submitted,

DONALD FRANCIS DONOVAN
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

STEPHEN B. BRIGHT
Southern Center for Human Rights
83 Poplar Street, N.W.
Atlanta, GA 30303

HAROLD HONGJU KOH
Counsel of Record
JAMES J. SILK
MARY J. HAHN
Yale Law School
Allard K. Lowenstein International Human Rights Clinic
127 Wall Street
New Haven, CT 06520
(203) 432-8368

Counsel for Amici Curiae